UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, MICHIGAN,	.	Docket No. 13-53846
	.	Detroit, Michigan
	.	July 16, 2014
Debtor.	.	9:00 a.m.
. . . . .		

EXCERPT OF HEARING RE. (#5021) ORDER REGARDING IDENTIFYING LEGAL ISSUES RELATING TO CONFIRMATION - ISSUES 1-6, 8, 10-14 TO BE HEARD (RE. RELATED DOCUMENT(S) 5014 NOTICE OF ADJOURNMENT OF HEARING (BK OTHER)) (CKATA) - COMMENT: ISSUE #12 RESOLVED - SEE ORDER AT DKT. #5668; ISSUES #13 AND #14 RESOLVED - SEE ORDER AT #5924; ISSUE #11 RESOLVED - SEE ORDER AT DKT. #6006; HEARING ON LEGAL ISSUE #4 RESCHEDULED FOR 7/17/14 AT 9 AM PER NOTICE AT DKT. #6003 (LEGAL ISSUE NUMBER 1)
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor:	Jones Day By: HEATHER LENNOX 222 East 41st Street New York, NY 10017 (212) 326-3837
	Jones Day By: BRUCE BENNETT 555 South Flower Street, Fiftieth Floor Los Angeles, CA 90071 (213) 243-2382
For Creditors Ryan, Phillips, Provience, Swift, Cuppetelli, Mendoza:	Goodman & Hurwitz, PC By: JULIE H. HURWITZ 1394 E. Jefferson Avenue Detroit, MI 48207 (313) 567-6170
For Dennis Trust:	Demorest Law Firm, PLLC By: MARK S. DEMOREST 322 West Lincoln Avenue, Suite 300 Royal Oak, MI 48067 (248) 723-5500

APPEARANCES (continued):

For County of Macomb, Michigan:	Dechert, LLP By: ALLAN S. BRILLIANT 1095 Avenue of the Americas New York, NY 10036 (212) 698-3600
For Oakland County, Michigan:	Carson Fischer, PLC By: JOSEPH M. FISCHER 4111 Andover Road, West - Second Floor Bloomfield Hills, MI 48302-1924 (248) 644-4840
For County of Wayne, Michigan:	Butzel Long, PC By: MAX J. NEWMAN Stoneridge West 41000 Woodward Avenue Bloomfield Hills, MI 48304 (248) 258-2907
For National Public Finance Guaranty Corp.:	Sidley Austin, LLP By: JEFFREY E. BJORK 555 W. 5th Street, Suite 4000 Los Angeles, CA 90013 (213) 896-6037
For Detroit Fire Fighters Association, I.A.F.F. Local 344:	Legghio & Israel, PC By: CHRISTOPHER LEGGHIO 306 South Washington, Suite 600 Royal Oak, MI 48067 (248) 398-5900
Court Recorder:	LaShonda Moss United States Bankruptcy Court 211 West Fort Street, 21st Floor Detroit, MI 48226-3211 (313) 234-0068
Transcribed By:	Lois Garrett 1290 West Barnes Road Leslie, MI 49251 (517) 676-5092

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THE CLERK: Calling Case Number 13-53846, City of Detroit, Michigan.

THE COURT: One moment, please. Okay. Good morning. I'd like to consult with you and review the schedule of the issues to make sure we are all coordinated here. I'm showing that Issues 1, 2, and 3 are proceeding as scheduled at 9, 9:30, and 10; that Issue 4 was moved to tomorrow at nine o'clock. Issue 5 is still on for today at 11:15, although if the attorneys show up before that, we can accommodate them. Issue 6, adjourned to July 31st at nine o'clock. Issue 7 is going as scheduled tomorrow at nine with Issue 4. Issue 8 was adjourned, I think, without date. Yes?

MS. LENNOX: Correct.

THE COURT: Issue 9 was resolved. Issue 10 is going today at two, and Issues 11, 12, 13, and 14 have all been resolved.

MS. LENNOX: That's correct, your Honor.

THE COURT: Yes? Okay. Then let's proceed with Issue Number 1.

MR. LEGGHIO: Good morning, your Honor. Christopher Legghio on behalf of the Detroit Fire Fighters Association. Just as a matter of housekeeping, your Honor, argument five is the argument that was filed by the DPOA, and the DFFA joined with them on that. And as the Court certainly knows, the DPOA has tentatively reached agreement, so we are here on

behalf of argument five, and we're just going to rely on the briefs, so I'm not going to --

THE COURT: I might have some questions for you.

MR. LEGGHIO: That's fine.

THE COURT: So let's hold on that and see where we are after Issue Number 3, okay --

MR. LEGGHIO: Okay. Your Honor, our --

THE COURT: -- if you don't mind coming back or being here until then.

MR. LEGGHIO: Okay. Our objections to the POA is it's very discrete. It deals with the hybrid pension plan for fire fighters and the ten-year injunction that the city has asserted into that plan. We believe that this is an effort to suspend the bargaining rights of the fire fighters for the next ten years, and it is to relieve the city of its duty to bargain for the next ten years. In that sense, it's a misuse of the POA, a bad faith use of the POA.

THE COURT: Well, but is the standard under applicable Michigan law whether that interval for collective bargaining is reasonable?

MR. LEGGHIO: That's one of the arguments that the city made, and it's -- the answer to that is no. The duty to bargain, as I pointed out in the brief, is not a term that has to be contextualized. It's not an amorphus term. It's not -- this Court has no authority to suspend the duty of

bargaining for ten years. The only time the duty to bargain and the concept of reasonable time are addressed is when the employer has sat down in a reasonable time after a union election or after a certification vote. If they avoid the bargaining table for a period of time after that, the board and the courts have found that that's not reasonable, but here they're asking you to repeal PERA for ten years. As I stand here today, your Honor, the duty to bargain that was suspended under the martial law of 436 snaps back in three years, and about three years is in a few months. It'll be five years from its imposition, and the duty to bargain will snap back. They're asking you to approve an order, a plan that will suspend that duty to bargain for another seven years. That's not reasonable. That's not how the -- that's not the test under the statute. This Court has no ability to judicially repeal PERA or relieve the city of its duty to bargain. They have their rights under 436. They can impose a hybrid. They're asking you to do more. They're asking to do what you cannot do.

THE COURT: What do the cases of AFSCME Local 25 versus Wayne County and Town & Country Plumbing & Heating versus NLRB hold?

MR. LEGGHIO: Your Honor, you have me at -- you have me at an advantage. I don't know what they hold, but they don't hold that this Court can suspend the duty of bargaining

for ten years.

THE COURT: Right, but they're not bankruptcy cases. But what do they hold about the Public Employment Relations Act?

MR. LEGGHIO: Your Honor, as I say, I can't quote the case.

THE COURT: Yeah. Okay. All right. I'm sorry. Fair enough.

MR. LEGGHIO: But I don't want to miss your point. If the Court wants to tell me what you're getting at, I'll be happy to respond.

THE COURT: Well, my question was what do they say about the duty to bargain. It's just a question.

MR. LEGGHIO: Okay. I'm not sure what the Court -- well, I mean, look, the duty to bargain is a -- the duty to bargain has been enshrined in this country's labor policy for over 80 years and 50 years in this state, and it is not a concept that is lightly dismissed. And the suggestion that this Court has the jurisdiction to suspend it for ten years is not tied to any law. They don't cite any bankruptcy law. They've had several occasions to do that, to cite any bankruptcy law that says that this Court can suspend the duty to bargain or, for that matter, become the --

THE COURT: Well, but you argue that it violates state law --

MR. LEGGHIO: Correct.

THE COURT: -- for the plan to have this so-called suspension. I mean we can argue about whether it's a suspension or not, but -- so the issue is not whether bankruptcy law allows it. The issue is whether state law allows it; right?

MR. LEGGHIO: Well, we don't have any quibble on that, your Honor. 436 suspended it.

THE COURT: All right. So what is it about state law that requires bargaining before ten years from now or ten years from confirmation?

MR. LEGGHIO: Well, let me unpack what the Court has just said.

THE COURT: Um-hmm.

MR. LEGGHIO: The duty to bargain is the duty to bargain at reasonable times, and it is not for this Court to decide ten years hence is the --

THE COURT: All right. So you concede that the duty to bargain is a duty to bargain at reasonable times.

MR. LEGGHIO: Your Honor, I'm not making any concession. That's in the statute.

THE COURT: Okay. Fair enough. So then the question becomes why isn't ten years a reasonable time?

MR. LEGGHIO: A ten-year hiatus on bargaining is, in effect, an abrogation of the duty to bargain. There's no

case law that anybody can cite in this courtroom in which the duty to bargain under any context, bankruptcy, non-bankruptcy, where an employer got a pass for ten years on the duty to bargain.

THE COURT: Well, there's a lot about this case that's sui generis; right?

MR. LEGGHIO: Correct, your Honor, but it is --

THE COURT: I mean it took 50 years for the circumstances that gave rise to this bankruptcy to develop, the city argues. The emergency manager law, PA 436, suspends the duty for at least five years.

MR. LEGGHIO: Maximum.

THE COURT: Five years. In those circumstances, why isn't ten a reasonable time?

MR. LEGGHIO: Well, your Honor --

THE COURT: The city needs some time period to be able to predict with some degree of certainty what its obligations are. Yes?

MR. LEGGHIO: Well, your Honor, that's the sophistry of their argument. By that standard, your Honor, as I pointed out in my briefs, they shouldn't stop at ten years. They should go 25 years of a hybrid plan. They should impose --

THE COURT: Well, but fortunately for you, they're not asking for that.

MR. LEGGHIO: Well, no.

THE COURT: They're asking for ten.

MR. LEGGHIO: It's not unfortunate, your Honor. The Court is trivializing my argument. It's not unfortunate for me they didn't ask for that. It's instructive. They should have asked for ten years on wage freezes and on holidays. All of those things, your Honor, I pointed out in the brief can be linked back to feasibility, but --

THE COURT: Let me ask you this question about state law. If there is a duty to bargain after five years and the bargaining fails, what does the Public Employment Relations Act say happens next?

MR. LEGGHIO: If the parties go to impasse, the city can impose. Very simple. That's standard basic labor law.

THE COURT: Um-hmm.

MR. LEGGHIO: But, your Honor --

THE COURT: There's no arbitration required?

MR. LEGGHIO: There is a 312 arbitration, sure.

THE COURT: There is arbitration?

MR. LEGGHIO: There's 312 for police and fire; correct, but, your Honor --

THE COURT: So it's not that the city can impose.

MR. LEGGHIO: Well --

THE COURT: There's arbitration.

MR. LEGGHIO: Your Honor, let me retract.

THE COURT: Okay.

MR. LEGGHIO: I'm operating in the world of 436, this rare --

THE COURT: No. I'm talking about five years from now.

MR. LEGGHIO: I understand. I understand. 312 is the tribunal that breaks the deadlock, the impasse deadlock between the employer and its public safety unions. It has been doing that for lo these many years. Now, that, too, has been suspended under 436, so we are not operating with that. And as you know, there has been legislation bandied about that was going to reformulate how 312 would operate, but that's the answer --

THE COURT: I actually don't know that, but okay. It doesn't matter.

MR. LEGGHIO: The answer to your question is it is -- goes to 312, your Honor, but to get to your point, your Honor, about why isn't ten years a reasonable time, I think, with respect to the Court, you're looking out of the wrong end of the telescope. The state legislature limited the suspension of the duty to bargain to five years. They can't do that under state law now. They're telling you --

THE COURT: I'm confused by your argument because, on the one hand, you say they limited it to five years. On the other hand, you say it's a reasonable time.

MR. LEGGHIO: I said the state legislature suspended the duty to bargain for five years.

THE COURT: In 436.

MR. LEGGHIO: Correct. They abrogated 436.

THE COURT: But in PERA you say it's a reasonable time.

MR. LEGGHIO: That's what they repealed by 436. They repealed the reasonable time requirement, and I called it martial law. The Court sighed a little bit because perhaps you think that's a pejorative way to look at it, but it's just --

THE COURT: It's a little bit of an exaggeration.

MR. LEGGHIO: Well, the suspension of the duty to bargain is one of the first things that go in martial law, and that's what happened here.

THE COURT: All right. Let's not have an argument about what constitutes martial law.

MR. LEGGHIO: I understand, your Honor, but I do want to get back to your point. What is happening here is they are asking you to extend 436, something the legislature did not do when it decided to suspend the duty to bargain, suspend the duty to bargain at reasonable times -- they're asking you to do that. They're asking --

THE COURT: Well, but at the same time, the legislature also imposed a financial control board on the

city for 13 years. Doesn't that suggest something about the legislative insight and intent regarding the need for financial stability and foreseeability for a long time, longer than five years?

MR. LEGGHIO: Your Honor, I'm not going to quibble about the need for financial stability or predictability or any of those things. That's, of course --

THE COURT: Well, but where's the predictability if this is thrown into the hands of an arbitrator whose decisions are unaccountable to anyone and unreviewable?

MR. LEGGHIO: Well, that's not true. A 312 panel has a duty to consider a city's economic situation in arbitration.

THE COURT: Right, but they're not accountable to anyone nor are their decisions reviewable; right?

MR. LEGGHIO: Well, that's not -- your Honor, 312 is --

THE COURT: Is that right?

MR. LEGGHIO: No, it's not correct, your Honor.

THE COURT: Who is the -- who are arbitrators accountable to?

MR. LEGGHIO: Courts, employers -- public employers have challenged 312 arbitration decisions like they challenge the decisions of --

THE COURT: Oh, on what ground are they

challengeable?

MR. LEGGHIO: That it exceeds their jurisdiction --

THE COURT: Well --

MR. LEGGHIO: -- to the extent that they did not consider the financial status of the city.

THE COURT: That's a pretty tough standard.

MR. LEGGHIO: Your Honor, that's by design. That's what the courts want, that they want finality with the arbitration process, so that's the standard.

THE COURT: Toughness of the standard is what the unions rely on in defending those arbitration awards, isn't it?

MR. LEGGHIO: The unions rely on the court's preference for finality with arbitration. That's what the court -- that's what the unions rely on. I would say to you, your Honor, that street runs both ways, of course. The cities -- the public employer cities rely on that when they want to enforce 312 awards also because --

THE COURT: I'm sure.

MR. LEGGHIO: And they look at the standards.

THE COURT: Um-hmm.

MR. LEGGHIO: But the Court -- your Honor, the Court's arguments here are strange.

THE COURT: Questions. I'm asking questions.

MR. LEGGHIO: Okay, your Honor.

THE COURT: I've got questions for the city, too.

MR. LEGGHIO: I heard them in the -- I heard them in the register of argument, but I'll retract that.

THE COURT: I've got questions for the city, too.

MR. LEGGHIO: Okay. Your Honor, I want to answer more of your questions, but I also want to put into the record three cases which I do not cite in my brief that I think are informative.

THE COURT: Okay.

MR. LEGGHIO: One is In re. Alabama Symphony Association. It's 155 B.R. 556. And there -- this was a -- this was a dispute between a symphony orchestra and an employer, and there the Court said it would be inappropriate for a Bankruptcy Court to sit at the head of the bargaining table. The Court is here merely to decide whether the parties ought to be divorced, not to decide the terms under which they shall live together. Now, here, your Honor, the Court has to look to Bildisco for some direction, and in Bildisco we know that the Court has authority to abrogate a collective bargaining agreement provided the appropriate evidence is presented to the Court. Here the state usurped that by just imposing 436, and so we didn't have to come here -- the city did not have to come here and ask you to abrogate a current collective bargaining agreement, but they are now asking you to decide the terms of a future collective

bargaining agreement. As I say in my brief, this deforms and kind of warps the process, and it deprives the union for the next ten years of part of its inventory when it comes to bargaining. And it queers the process. It makes it impossible to bargain effectively if part of your inventory, your negotiating coins, have been removed by this Court. The city's argument, at the end of the day, they get -- we predicted this, as a matter of fact. I have to tell you I've thought -- I prophesized this in our initial brief before I saw the city's argument -- is they get to this argument crab-like, but they get to the argument that it's all linked to feasibility. And as I say, that argument has to fail because by that argument, they could ask this Court to impose wages, fringe benefits, holidays, compensation pay, pension plans. To that point, your Honor, let me cite another case for you, In re. Rath Packing, 36 B.R. 979. The court said this court does not have the choice to decrease or increase incentive pay, to pay or not to pay for three days of sick leave, to terminate or reinstate a pension plan. This court doesn't have the choice to mandate 7.24 an hour or eight dollars an hour or 10.24 an hour. And the court doesn't have the choice of reducing or increasing benefits. What they're telling you, your Honor, is that you should set the wage and price controls for the next ten years. Now, think about it in this terms. Could the city come in here and ask you to impose on

a vendor for the next ten years the price of their products to the city? Is that what this Bankruptcy Court has authority to do? We think the elemental threshold consideration is is are you a body that controls future economic relationships? You are not. This Court affects future -- the future of a debtor only by affecting the debtor's current and past debts, and it's not the guardian of what the city does in the future.

Your Honor, nobody wants to see the city fail going forward, not my client, not any union that I'm aware of, not this Court, not anybody in this courtroom, but if -- you know, Frank Borman's quote about bankruptcy being to capitalism what hell is to Christianity, you should not be someone who tries to control the future of what the city does ten years hence at the bargaining table. That is beyond this Court's jurisdiction. That's what the --

THE COURT: Even if the evidence establishes that it's necessary to do that for the city to establish the feasibility of its plan?

MR. LEGGHIO: The answer to that is, your Honor, the city cannot wave the feasibility flag to ask this Court to march into the future for ten years and control what happens at the bargaining table. Now, we hope saner heads prevail. We would assume they will. But however noble this Court's intent is, it is not -- you haven't been licensed to go ten

years forward and control the wages and the benefits. And the Court -- I don't mean to be pejorative, but the Court kind of scoffed at the notion about ten or twenty or twenty-five years, but that's the reality. The feasibility argument spun to its conclusion says let's set this up for 25 years. Let's set up the wages and the benefits, and we will lock down the feasibility question forever, but that isn't fair. It isn't fair on a lot of levels, and it's certainly not fair because there is state statute that prohibits it.

THE COURT: Well, but isn't your proper response to that argument not that it can't be done but that it isn't necessary to establish feasibility as a matter of fact?

MR. LEGGHIO: Your Honor, I'm always prepared to be educated. I would accept that as part of the argument, but I also take the position that I don't know where the Court gets the authority to dictate economic terms for not yet incurred debts and to determine the economic relationship of future party -- the future parties, the unions and the city. I mean how can -- where does the authority come from?

THE COURT: It comes from the authority, if at all, in PERA to determine what's a reasonable time.

MR. LEGGHIO: Well, your Honor, that is -- that argument, to be blunt, is nonsense. Ten --

THE COURT: What's nonsense about it?

MR. LEGGHIO: The duty to bargain is measured by

when the duty starts. When 312 expires, the city has a duty to bargain. What is the answer to that? Does a duty to bargain stop, your Honor, when an employer says, you know, I've been having bad times, so I don't have to bargain? Run that up in front of the National Labor Relations Board. See how many cases there are where the board said we're going to suspend for ten years the duty to bargain because you're having bad economic times. That's not the measurement. That's not the test. You don't contextualize that term. It is an absolute duty, and it's a duty measured -- the only time there's any examination done as to what is a reasonable time, it's in terms of, well, there was a union election in January, and they didn't sit down till June. Is that a reasonable time, or is it if they wait 18 months, is that unreasonable to dodge your duty to bargain? It's not measured by ten years, and it's -- and the employer cannot offer as a defense to duty to bargain in a reasonable time that, well, we're broke, so we just thought it wouldn't make sense to bargain. There's no case law that supports that, and this is some -- your Honor, this is serious stuff. This is 80 years in the federal sector, 50 years in this state of a duty to bargain, and it's been enshrined in a statute. And I think it should be instructive to this Court that what the state legislature did -- and 436 is a heavy-handed statute, your Honor, and they checked themselves at five years. Hell,

they could have gone for ten years if they wanted to if they really thought this was the way it was to go. Now this Court under the guise of reasonable time is going to say, well, I'm going to graft onto 436 another five years of the duty -- suspend the duty to bargain. That exceeds by miles anything this Court can consider.

THE COURT: Thank you, sir.

MS. LENNOX: Good morning, your Honor. For the record, Heather Lennox of Jones Day on behalf of the city. I'd like to actually just go through our reasoning, your Honor, based on what the statutes actually say and how we thought about this, so obviously we start with PERA. And Section 15(1) of PERA generally requires that a public employer shall bargain collectively with the representatives of its employees, and that means to meet at, as your Honor pointed out, reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment. As Mr. Legghio acknowledged, PA 436 under Section 27(3) suspends that for a period of five years. It suspends the duty in its entirety, which is something different than we're doing here, but I'll get to that later. It also didn't say -- it suspends it for five years, but it didn't say but it couldn't go longer. It put a particular period in this portion of the statute, and it said nothing beyond that. In addition --

THE COURT: Well, but isn't it implicit in the five-year time limit that the statute, 436, prescribes that it can't be longer than five?

MS. LENNOX: I don't think so, your Honor, and I think when PA 436 was enacted, I think it was trying to be a comprehensive statute to deal with a particular emergency. Of course, you never know how long an emergency is going to last, and that gets into later statutes that I want to discuss with you because I think they interact. But when this was enacted in PA 436, the legislature also amended PERA itself, and they put in Section 15(7) of PERA that's a complement to this that says that for contracts -- or collective bargaining agreements enacted after March 16th, 2011, they shall have a provision that acknowledges that an emergency manager can reject, modify, or terminate that contract, and, in addition, PERA was further modified at that time by Section 15(8) which says, and I quote, "This act," meaning PERA, "does not confer a right to bargain that would infringe on the exercise of powers under the local government and school district financial accountability act," which is now PA 436. So there is a determination at the time by the Michigan legislature that the powers of the state to rectify a fiscal emergency for one of its --

THE COURT: Pause for a second. You say "which is now PA 436"?

MS. LENNOX: Um-hmm.

THE COURT: What do you mean by that?

MS. LENNOX: Well, at the time this was amended, PA 4 was still in effect --

THE COURT: Okay. So what --

MS. LENNOX: -- which was then replaced by PA 436.

THE COURT: So what is there in PA 436 that makes that language applicable to it?

MS. LENNOX: I have to get back to that, your Honor, but I believe that in many instances it replaces -- the two just replace each other, but I would like to hold that for a minute, your Honor. But regardless of that --

THE COURT: That's a link in your chain that needs to be filled in. I understand there may be some legislative history suggesting this.

MS. LENNOX: Right.

THE COURT: But my question isn't that. It's what's in the statute?

MS. LENNOX: Right. I will reserve that, your Honor. But the point that I was trying to make here is at the time the Michigan legislature enacted all of this stuff, I think they made a determination that to rectify a fiscal emergency for one of its municipalities, that sort of tempers the ordinary legislature grant of the right of public employees to collectively bargain that would apply in

ordinary nonemergency times, and that's evidenced by the language embodied in 436 elsewhere, which generally grants very broad powers. First, Section 3 of PA 436 goes through these purposes and reiterates these purposes. The legislature provided that the fiscal accountability of local governments is vitally necessary to the interests of the citizen of this state to assure the provision of necessary governmental services essential to public health, safety, and welfare. In Section (b) of that, Section 3(b), they found that it's a valid public purpose for the state to take action and to assist a local government in a financial emergency. In Section (c), they found and held that the fiscal stability of local governments is necessary to the health, safety, and welfare of the citizens of this state. And in Section (d) they found that the authority and the powers conferred by this act constitute a necessary program and serve a valid public purpose.

THE COURT: Okay. But how does all of that add up to more than five years being permissible?

MS. LENNOX: Okay. Again, I'm going to take this into the new statutes that were enacted because nothing in there is -- nothing in the language of 27(3) says five years and it shall never be more. Those words were not added and I think properly so because, again, when you're dealing with a fiscal emergency, particularly one of a municipality --

THE COURT: Well, but the words "or longer if necessary to accomplish the purposes of this act" are also not in there.

MS. LENNOX: That's right, your Honor, and there's probably a reason that they didn't put either one of them in, to provide the flexibility that I think came later, but I want to -- before I go on to the later statutes, I want to talk about this one because I think there --

THE COURT: Okay.

MS. LENNOX: -- are two other provisions in PA 436 that are relevant. Section 9(2) of PA 436 gives the emergency manager broad powers to rectify the financial emergency and to assure the fiscal accountability of the local government. There's no time frame on that. And Section 12(1) of PA 436 provides that the emergency manager can analyze the factors contributing to the financial emergency and initiate steps to correct the condition, so I was surprised to read -- and Mr. Legghio argued it today -- in their brief when he was talking about the duty to bargain, he said, "Stated another way, an employer's duty to bargain is not assessed in the context of the employer's finances." And I think when you try to read the interaction between PA 436 and PERA together, that cannot possibly be the case. And I said, well, wait a minute. The legislature, in connection with the grand bargain, just enacted a whole package of

statutes, some of which approved the funding for the grand bargain, but some of which went way beyond that, so what did the legislature have to say about that in the context of this case now? And here's what they said. And I think their legislative focus on the primacy --

THE COURT: I have to ask you to pause before you jump to the new legislation. Is it your argument that those broad powers that PA 436 gives to the emergency manager somehow authorizes the emergency manager to suspend collective bargaining for more than the five years otherwise specified in PA 436?

MS. LENNOX: I do, and I'll tell you why.

THE COURT: That's a tough argument because normally the rule of statutory construction is that the specific prevails over the general. Yes?

MS. LENNOX: That is normally the rule, but, again, this is going to hearken back at the end of the day after I set the statutory predicate to what does "reasonable" mean and what does "reasonable" mean in this context, and you have to bring all this together, including the new statute and the new legislation, all of it together to figure out what are we doing in the plan. And then I will go through, your Honor --

THE COURT: Okay.

MS. LENNOX: -- what are we doing in the plan and how does this all fit together. So the new legislation, I

think, continued the legislative focus on the primacy of the long-term financial stability of this city in particular, and there are two of the statutes that I'd like to focus on. The first, as your Honor pointed out and your Honor noted, there's a statute enacted at MCL 141.1631 to 1643, and that was the statute which was formerly House Bill 5566, which created the financial review commission. Again, Section 2 of that act sets forth a laundry list of reasons why they were doing this and the reasons for doing it and the purposes for doing it, and those findings include the public policy of the state and overseeing the long term financial stability of its municipalities so they can provide for the financial safety and welfare of the citizens. They specifically mention the Detroit pensions. They said the underfunding of the pensions that contributed to the financial and market uncertainty across the state, not only in Detroit, and they also found that the fiscal oversight over qualified cities will ensure that those cities do not engage in the financial practices that led to financial emergencies and insolvency. So to that end, this new statute gives the financial review commission a couple of powers. One, it is going to have to ensure that the city complies with whatever plan of adjustment is confirmed in this case, and the plan of adjustment, as your Honor pointed out, contemplates a period much longer than the next couple of years. In addition, Section 6(9) of the

statute provides that the financial review commission will approve all CB -- collective bargaining agreements. And a companion statute to this package did amend Act 312, which you were discussing with Mr. Legghio earlier, and it amended Act 312 to provide that an arbitrator must consider the municipality's financial ability to pay and that that is the most important factor for an arbitrator to consider. So I think it's pretty clear under Michigan law now that the city's duty to bargain is assessed in the context of the city's finances. They absolutely are looking for when you figure out what is a reasonable period to bargain, you have to look at it in the context of the city's finances.

THE COURT: But isn't it a reasonable inference from the legislature's inclusion of that mandatory consideration for arbitration that the legislature assumed or considered that there would be collective bargaining during that time period?

MS. LENNOX: I think they assumed that when there is collective bargaining, that this is an important factor to consider. I don't think they say anything about what is a reasonable period. They are focusing on the financial primacy or the financial stability of a municipality, and it's not just Detroit because this applies to all the municipalities in the state.

THE COURT: Okay. And the follow-up question is if

it's the state law that the arbitrator is supposed to take into account the city's fiscal circumstances, doesn't that suggest that under state law this Court should defer that issue to the arbitrators when and if it ever gets there and not impose a ten-year time limit?

MS. LENNOX: Well, that begs the question of what we need to talk about, which is the real question here, which is when is the reasonable time to start bargaining on this. That's the question. Remember, the right to bargain under PERA says you bargain at reasonable times. You only get to arbitration when everything breaks down after bargaining, so you have to hearken back to when is the reasonable time to bargain, and in light of that question, given all this background, let's look at what the plan is actually doing for that question. So, first, I think it's an overstatement to say that the plan doesn't prevent bargaining.

THE COURT: To say what?

MS. LENNOX: It's an overstatement to say that the plan prohibits bargaining. The plan -- people are going to be bargaining after their contracts are up, assuming we ever reach contracts, on any number of issues. What the plan does, it constrains what the city or the financial review commission because it has to approve new contracts can approve vis-a-vis pensions only and only on a temporary basis, only through June 30th, 2023, and why is that

important because that hearkens back to the legislation and traditional labor law? Because I think, given the finding in Section 2(b) of what was House Bill 5566 about the disastrous effects that the city's pension's plans are having not only on Detroit but on communities statewide and given the legislature's emphasis on the critical need to bring fiscal stability to Detroit and to restore the provision of adequate services to Detroit's people, holding pension contributions, which is a huge budget item, steady for the next ten -- or the next nine years really is reasonable. It is a reasonable measure and a reasonable time frame. It coincides with the emergency manager's plan to give the city through fiscal year 2023 to stabilize itself and to provide the funds for the critical reinvestment that we need for the city. The whole ten-year plan is based on these crucial assumptions.

Now, they say nine years is too long, but they're looking at this through a prism of ordinary bargaining in ordinary times, and that's all the cases that were cited, ordinary bargaining in ordinary times. These are extraordinary times in a fiscal emergency.

THE COURT: Well, but they also cite cases that say that the duty to bargain applies regardless of the employer's financial circumstances.

MS. LENNOX: And we cite cases where courts have held that fiscal emergencies warrant the suspension of

bargaining, and, again, this is not wholesale suspension of bargaining. This is one issue. We have cited cases where courts have held that this --

THE COURT: Let's pause on that. Does it make any difference in analyzing Section 943 and the duty to bargain, for that matter, that it's just the one pension issue and not everything else?

MS. LENNOX: I think as a practical matter, your Honor, it -- or as a legal matter, your Honor, it doesn't. As a practical matter, your Honor, I think it does.

THE COURT: What do you mean by that?

MS. LENNOX: Because I mean that the parties -- I think there is an implication that we are trying to wholesale take away union bargaining rights, and that is simply not the case. There's one issue that is of such critical importance given the history of this to this city and given the next nine years that we want to hold steady.

THE COURT: Okay. So Mr. Legghio argues in response that if fiscal stability is so important, the plan would also prohibit bargaining on the other economic issues, wages, for example.

MS. LENNOX: And that --

THE COURT: But you don't do that.

MS. LENNOX: That's exactly right, and here's -- and that proves the point that what we are trying to do is have a

very narrowly tailored reasonable response for a reasonable period of time to a fiscal emergency, which is entirely consistent with the duty to bargain under PERA. We could have tried to, in my view, go overboard and say we're not talking to any of our unions about anything for the next nine years. We didn't do that, and so we think that given the reasonable -- the obligation to bargain at reasonable times under PERA and given the cases that we cite in our papers, including a Supreme Court case, that say that in fiscal emergencies -- these cases that we cite on our paper are talking about -- and our brief, your Honor, talk about courts allowing actual breaking of contracts that are in existence today in fiscal emergencies and suspending bargaining under contracts that exist today in fiscal emergencies, and they can modify contracts that already exist. We are doing less than that here. We are not breaking contracts. We don't have a contract with the DFFA. We seek -- what we're seeking is a reasonable and temporary restriction on what pension terms may exist for the next nine years, so it's prospective only, to address the fiscal emergency and provide for the assumption of adequate city services. Given the fact this is reasonable, temporary in time, and prospective in nature, I think this complies particularly with the Blaisdell case that the United States Supreme Court decided and with the Buffalo Teachers Federation case that the Second Circuit decided that

we cited in our papers. Nothing in PERA, Section 15(1), which imposes the duty to bargain statutorily, defines what a reasonable period is to commence bargaining, and Mr. Legghio admits that.

In light of what I've already run through, the city believes that the plan sets forth a reasonable period in which to start bargaining over one issue, future pension terms. This doesn't violate PERA. It is actually, your Honor -- what we've been trying to do here is we have three sets of state statutes now, PA 436, the new legislation, and PERA -- what we do in our plan is actually harmonize those statutes so they can all work together, which is actually the goal of statutory construction. Nothing in PERA says -- defines a time for reasonable. We think under the fiscal emergency that we're under, we have defined a narrow reasonable time on one issue, and we think this allows the Court to read the statutes harmoniously together, and I have yet to hear how there's a real violation of PERA.

THE COURT: Thank you. Mr. Legghio, any rebuttal?

MR. LEGGHIO: Yes, your Honor, I do. I'm going to divide my rebuttal into two parts. One is to the argument -- the statutory argument that's made by the city about the language in 436 and PERA and, secondly, on this -- the duty to bargain, which has been kind of -- I think been contorted in this presentation today. What the city is arguing to you

is that the absence of language in PERA beyond the five years is an invitation to do anything; that the absence of language in PERA lets you do anything, which is an interesting statutory construction.

THE COURT: Mr. Legghio, I need you to be by the microphone when you're addressing the Court because --

MR. LEGGHIO: I apologize, your Honor.

THE COURT: -- we're making an audio recording here, yeah.

MR. LEGGHIO: So this is the argument that the absence of language in 436 that prohibits anything beyond five years is the right to read anything you want into the statute, but the statute actually favors a shorter period of time. The suspension of the duty to bargain under PERA, under 436 says that it is -- it halts after five years or when the receivership ends, whichever comes first. So the plain language of the statute is inconsistent with the argument that you can do anything you want, so the logic of no limitation language means you can do anything is clear. The language of the statute suggests that the shorter the period, the better, and I think that's a gesture toward the significance of collective bargaining. So the five-year period suspension is not what applies. What applies is when the city goes out of receivership.

Now, on this reasonable time to bargain, I guess the

city's argument is that asking you to impose a ten-year suspension on the duty to bargain is reasonable, and they say that nothing in PERA says what's reasonable and that I know that. I also know what the Michigan Employment Relation Commission decisions are. We scoured those. We haven't found any that gave an employer ten years to not go to the bargaining table or anything remotely close to that, but the duty to bargain --

THE COURT: Well, but none of those involve municipal bankruptcies either.

MR. LEGGHIO: Your Honor, fair enough, but if we're going to interpret what the duty to bargain is, we do have to go to the sources, those bodies that have been entrusted with interpreting the statute, and MERC has never suggested ten years is an appropriate time period. But there's a contortion here of what this duty to bargain is. The duty to bargain under the current scenario will snap back either in five years or when the receivership ends, and from that moment on the measurement starts. What is reasonable time to bargain? They're suggesting that phrase is an empowering phrase that gives you almost unlimited authority to continue the suspension under 436. The measurement starts when the snap-back occurs, not -- it is not a phrase that is ambiguous enough to empower a Bankruptcy Court to suspend that duty beyond what the statute says, a statute which favors actually

a shorter period of time than five years if the circumstances permit.

Now, I applaud the city's prudence and their virtue in not trying to take all things away from the bargaining table. They're only taking the pension benefit away, but that's a nonstarter. Collective bargaining is a messy process, and you use everything you can when you bargain. They're asking you, as I said in the brief, to put your thumb on the scale, to take away from the union the ability to negotiate smaller pension changes in exchange for maybe better wages or better healthcare or an extra day off. That's what they're doing. They're asking you to sit at the bargaining table and side with them for the next ten years. That's the advantage of doing only one thing. That's not virtue. That's scheming, and that's what they're doing. They're asking you to be a player with them for the next ten years.

Your Honor, the duty to bargain, I think -- let me take it out of my context. The federal and state statutes in this country have declared what the importance of the duty to bargain is, and the history of duty to bargain was -- back in the '30s it was designed to prevent violence, and it has been by statute designed to solve workplace issues, and they are asking you to solve a workplace issue. I think it's beyond this Court's office. However lofty or noble this Court's

purposes may be, this Court doesn't have the jurisdiction to affect the collective bargaining process for the next ten years no more than this Court could set the electric rates that the city has to pay for the next ten years with the city -- with Detroit Edison. You don't have that authority to go into the future for a debt that's yet incurred for labor that's not yet incurred.

THE COURT: All right. Thank you very much, sir.

MR. LEGGHIO: Thank you, your Honor. Your Honor, on the --

THE COURT: On Issue Number 5, I want to see if I'm going to need you for that. Okay? Was it Number 5?

MR. LEGGHIO: Yes, your Honor.

THE COURT: Okay. So give me just a moment. And let me ask while I'm checking this out whether the city would agree to the waiver of oral argument on Issue 5.

MS. LENNOX: There were two parties affected by Issue 5, your Honor. I'm perfectly happy to raise it -- to waive it with respect to Mr. Legghio's client.

MR. LEGGHIO: Who's the other one?

MS. LENNOX: The other one is National Public Finance, and I don't know if they plan to press that or not today, so -- but I'm perfectly happy to raise the -- waive it with respect to Mr. Legghio's client.

THE COURT: Okay. Their issue, although it's a

classification issue, is a --

MR. LEGGHIO: Different issue.

THE COURT: -- is a different classification issue; right?

MS. LENNOX: Correct. That's correct.

THE COURT: Okay. Hold on. Well, I actually had a question for the city that was tangentially related to this issue of classification. I suppose the question is such that we could deal with it at the confirmation hearing rather than in today's context. And the question relates to -- hold on one second -- a little confusion on my part as to -- one more second, please -- how the new PFRS active pension plan formula works in relation to the new PFRS active pension plan works.

MS. LENNOX: The --

THE COURT: I don't need or want an answer now.

MS. LENNOX: Oh, okay.

THE COURT: But it's a question that we're going to have to address at some point.

MS. LENNOX: Okay. Happy to do that, your Honor.

THE COURT: All right. Otherwise I'll take this matter under advisement, and we'll waive argument.

MR. LEGGHIO: Thank you, your Honor.

THE COURT: You're welcome.

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WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett July 21, 2014

Lois Garrett